DN FST CV 15 6048103-S

DONNA L. SOTO, ADMINISTRATRIX	)	SUPERIOR COURT
OF THE ESTATE OF VICTORIA L.	)	
SOTO, DECEASED, ET AL.	)	J.D. OF FAIRFIELD/BRIDGEPORT
	)	@ BRIDGEPORT
v.	)	
	)	
BUSHMASTER FIREARMS	)	
INTERNATIONAL, LLC, ET AL.	)	February 16, 2016

THE REMINGTON DEFENDANTS'
REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' interpretation of the PLCAA disregards the statute's text, definitions and purpose. Their interpretation of the PLCAA, if accepted, would render the statute a largely meaningless congressional act offering law-abiding manufacturers of lawful firearms little protection from the burdens of litigating cases in which criminals have misused firearms and caused harm. In order to accept Plaintiffs' interpretation of the PLCAA, one must accept that Congress did not intend to achieve its clearly stated purpose of prohibiting causes of action against firearm manufacturers and preventing the use of lawsuits to impose unreasonable burdens on those who are federally licensed to make and sell firearms. Plaintiffs' interpretation of the PLCAA is not just expansive; it is wrong and it should be rejected.

The firearm purchased by Nancy Lanza was lawfully manufactured, marketed and sold by the Remington Defendants under applicable federal, state and local statutes and regulations. There are no contrary allegations. The firearm was not defective; it functioned as it was designed to function. Several years later, a criminal misused the firearm to commit a horrific crime. The PLCAA was enacted to protect the Remington Defendants and other firearm manufacturers from having to defend themselves in court in this very type of case.

ARGUMENT

A. PLCAA Immunity Implicates this Court's Subject Matter Jurisdiction.

Plaintiffs' argument that PLCAA immunity is not jurisdictional should be rejected. Whether a defendant is immune from liability is a threshold question to be resolved at the "earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *accord Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (A court "must make the 'critical preliminary determination' of its own jurisdiction as early in the case as possible; to defer the question is to 'frustrate significance and benefit of entitlement to immunity from suit.'").

Immunity is, after all, "an entitlement to not stand trial or face the other burdens of litigation." *Id*. at 200. These fundamental jurisdictional principles are embodied in the plain language of the PLCAA: lawsuits against firearm manufacturers seeking damages resulting from the criminal misuse of lawfully manufactured, non-defective firearms "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). Indeed, Congress clarified that PLCAA immunity is not merely a defense to be addressed following discovery; rather, lawsuits that were pending when the PLCAA was enacted were to "be immediately dismissed." 15 U.S.C. § 7902(b).[1]

Among the stated purposes of the PLCAA was "[t]o prevent the use of such lawsuits to impose unreasonable burdens" on firearm manufacturers engaged in interstate commerce. 15 U.S.C. § 7901(b)(4). Congress plainly intended the PLCAA to operate not just as a defense to liability but as a prohibition on bringing suit in the first instance. Connecticut courts have recognized that the purpose behind similar statutory and certain common law immunities is "protection against 'having to litigate at all'" and have held that such immunities implicate the courts' subject matter jurisdiction. *Rioux v. Barry*, No. CV54007375S, 2006 Conn. Super. LEXIS 47, *9 (Conn. Super. Ct. Jan. 3, 2006) (citing *Chadha v. Charlotte Hungerford Hospital*, 272 Conn. 776, 786, 865 A.2d 1163 (2005)); *see, e.g.*, *Traylor v. Gerratana*, 148 Conn. App. 605, 612-13, 88 A.2d 552 (2014) (qualified immunity properly raised on a motion to dismiss); *Ngetich v. Miller*, No. CV1260174188, 2014 Conn. Super LEXIS 601, *30 (Conn. Super. Ct. Mar. 14, 2014) (qualified immunity properly raised on motion to dismiss); *Day v. Smith*, No. CV074027999S, 2008 Conn. Super. LEXIS 319, *16 (Conn. Super. Ct. Feb. 11, 2008) (absolute immunity for quasi-judicial acts implicates court's subject matter jurisdiction); *Jonas v. Delallo*,

[1] *See* 151 Cong. Rec. S9374 (Sen. Craig) ("One key element of the legislation is to provide for the dismissal of pending litigation. Dismissals should be immediate not after trial. Courts should dismiss on their own motion, instead of forcing defendants to incur the additional costs and delay of filing motions and arguing.").

No. CV105029297S, 2012 Conn. Super. LEXIS 3039, *9 (Conn. Super. Ct. Dec. 11, 2012) (absolute immunity for statements made in judicial proceedings implicates court's subject matter jurisdiction). The Remington Defendants' immunity under the PLCAA in this case should fare no differently.

The only Connecticut court to address PLCAA immunity agreed: the PLCAA implicates subject matter jurisdiction in Connecticut courts and is properly addressed on a motion to dismiss. *Gilland v. Sportsmen's Outpost, Inc*., (*Gilland II*), No. CV095032765S, 2011 Conn. Super. LEXIS 2309, *16-19 (Conn. Super. Ct. Sept. 15, 2011) (motion to dismiss by firearm seller granted because PLCAA barred the action). Plaintiffs argue, however, that *City of New York v. Mickalis*, 645 F.3d 114 (2d Cir. 2011), supports a finding that firearm manufacturer immunity under the PLCAA is not jurisdictional in Connecticut state courts. But the court in *Gilland II* rejected Plaintiffs' argument based on the distinction between subject matter jurisdiction in federal district courts and Connecticut courts:

> *Mickalis* concerned subject matter jurisdiction in the United States District Court, not in the Connecticut Superior Court. Whether a federal court has subject matter jurisdiction presents a question which differs from whether this court has subject matter jurisdiction. "Federal district courts, like other Article III courts, are 'courts of limited jurisdiction . . . [that] possess only that power authorized by [the] Constitution and statute.' *Exxon Mobil Corp. v. Allapattah Servs*., 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005)[.]" (Internal quotation marks omitted). *Arar v. Ashcroft*, 532 F.3d 157, 170 (2d Cir. 2008).
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> "[U]nlike the judicial articles of most state constitutions and that of the United States constitution (article III), the powers and jurisdiction of the two courts [originally] specifically named in the Connecticut constitution (the Supreme and Superior Courts) are not specified. The reason is obvious. The 1818 constitution neither created nor provided for the creation of a new judicial system of new courts. Rather, it adopted and gave permanence in the constitution to the existence of the . . . Superior Court as the trial court of general jurisdiction." (Footnote omitted; internal quotation marks omitted.) *State v. DeJesus*, 288 Conn. 418, 456-57, 953 A.2d 45 (2008). In contrast to the United States District Court, this court's subject matter

> jurisdiction is derived from Connecticut law, not the United States Constitution or federal statutory law. *See id*.

Gilland II, 2011 Conn. Super. LEXIS 2309 at *18-19. Thus, whether the PLCAA deprives a federal district court of its already limited subject matter jurisdiction is an entirely different question from whether the PLCAA implicates the general jurisdiction of Connecticut Superior Courts.[2]

Plaintiffs contend that the PLCAA does not implicate subject matter jurisdiction because the Remington Defendants "do not assert that this Court lacks subject matter jurisdiction over 'the class of cases to which this action belongs.'" (Pls.' Obj. at 10.) Again, Plaintiffs are incorrect. The Remington Defendants have made precisely that argument: civil actions in which a firearm manufacturer is alleged to be liable for damages resulting from the criminal misuse of a lawfully-manufactured, non-defective firearm are categorically barred under the PLCAA. Under the plain meaning of the PLCAA, there is no more obvious "class of cases" subject to dismissal than one seeking to impose such absolute liability on firearms manufacturers for the criminal misuse of their lawfully-manufactured products. *See Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) ("The PLCAA explicitly and clearly prohibits this kind of suit.").

Plaintiffs also incorrectly assert that whether their allegations "are not consistent with any of the causes of action preserved under PLCAA" exceptions is a question of "sufficiency" more properly addressed on a motion to strike. (Pls.' Obj. p. 10.) As to the Remington Defendants,

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[2] Plaintiffs argue that *Gilland II* "should not be read as endorsing defendants' position that PLCAA is jurisdictional" because the court "permitted plaintiffs to amend their complaint multiple times." In Plaintiffs' view, because "a true motion to dismiss does not permit amendment," the court essentially treated the defendant's motion as a motion to strike. (Pls.' Obj. at 11, n. 3.) Plaintiffs have misread *Gilland II*. The court did not permit plaintiffs to amend their complaint. Rather, plaintiffs did so twice without leave of court in reaction to defendants' motions to dismiss. When plaintiffs attempted to amend their complaint a third time, the defendants objected and the court declined to rule on the plaintiffs' request for leave to amend. The court then scheduled defendants' motion to dismiss for hearing, and granted the motion, holding that the immunity conferred by PLCAA was jurisdictional.

Plaintiffs have attempted to plead a civil action against them in their capacity as manufacturers of a lawfully-sold, non-defective firearm for damages resulting from a criminal misuse of the firearm. The action against the Remington Defendants does not fit within any exception to PLCAA immunity. Plaintiffs' case is a square peg that they have tried to fit into a round hole, and it should be dismissed.[3]

The cases Plaintiffs rely upon for the proposition that PLCAA immunity in this case can only be raised on a motion to strike are not helpful to their position. Unlike this case, they each involved challenges by a defendant to the sufficiency of a plaintiff's allegations rather than the species of challenge the Remington Defendants make here, which is that the allegations made by Plaintiffs conclusively establish the Defendants' immunity and right to dismissal. "There is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* asserted a cause of action, and therein lies the difference between a motion to dismiss and a motion to strike." *Egri v. Foisie*, 83 Conn. App. 243, 247, 848 A.2d 1266 (2004) (emphasis in original). The Remington Defendants' motion to dismiss "attacks the jurisdiction of the court, asserting that the plaintiff *cannot* as a matter of law and fact state a cause of action that should be heard by the court." *Gurliacci v. Mayer*, 218 Conn. 531, 541, 590 A.2d 914 (1991) (emphasis in original). The Remington Defendants have not challenged the sufficiency of Plaintiffs' allegations. To the contrary, the Remington Defendants maintain that Plaintiffs "*cannot*

[3] Plaintiffs also argue that whether they stand in a commercial relationship with the Defendants and thus have standing under CUTPA is not the proper subject of a motion to dismiss because it is not jurisdictional. (Pls.' Obj. at 41, n. 22.) Plaintiffs are incorrect. It is settled that the issue of standing implicates the courts' subject matter jurisdiction. *Eder Brothers v. Wine Merchants of Connecticut, Inc*., 275 Conn. 363, 368-69, 880 A. 2d 138 (2005) (addressing CUTPA standing on motion to dismiss). It is equally settled that whether a plaintiff stands in the requisite relationship with a defendant to maintain a CUTPA claim is a question of standing. *Jackson v. R.G. Whipple, Inc*., 225 Conn. 705, 726-27, 627 A. 2d 374 (1993); *Golden v. Hammer*, No. CV085008396S, 2009 Conn. Super. LEXIS 2309, *23-24 (Conn. Super .Ct. Aug. 25, 2009) (addressing on a motion to dismiss whether plaintiff had alleged a business or consumer relationship with the defendants).

as a matter of law and fact state a cause of action" against them that would escape the immunity conferred by the PLCAA. *Id*. at 541. Accordingly, this Court does not have jurisdiction to hear the case against the Remington Defendants.

Plaintiffs mistakenly rely on *Gurliacci*. There, the question before the court was whether "the failure of the plaintiff to allege sufficient facts" to fall within exceptions to the fellow employee immunity rule "deprived the court of subject matter jurisdiction, so that a motion to dismiss was the proper procedural vehicle, or whether such a pleading failure merely deprived the complaint of a legally sufficient cause of action, so that a motion to strike was the proper procedural vehicle." 218 Conn. at 542-43. The court held that "the fact that the plaintiff's complaint failed to allege facts that would have removed it from the operation of the fellow employee immunity rule (willful and malicious conduct) merely reflect[ed] that the complaint failed to state a legally sufficient cause of action." *Id*. at 544. Thus, a motion to strike was held to be the proper motion to challenge the sufficiency of the plaintiff's allegations because "facts may exist which … would establish a cause of action." *Id*. In this case, Plaintiffs have already pleaded facts that establish the Remington Defendants' immunity under the PLCAA.

Plaintiffs' reliance on *Egri* is also misplaced. There, the defendant filed a motion to dismiss based on sovereign immunity, arguing that "plaintiff's pleadings were insufficient to state a cause of action" but acknowledging that "the plaintiff can potentially state a claim" under a statutory exception to immunity. 83 Conn. App. at 247-50. The superior court granted defendant's motion to dismiss, finding plaintiff's allegations insufficient. The appellate court reversed, concluding that the defendant's acknowledged challenge to the sufficiency of plaintiff's allegations was not properly decided on a motion to dismiss. *Id*.; *see also Jane Doe v. Oliver*, No. CV990151679S, 2000 Conn. Super. LEXIS 570, *3-4 (Conn. Super. Ct. Mar. 7, 2000) (motion to

strike was "the proper vehicle" to test the defendant's challenges to the plaintiff's complaint, which included an immunity defense, because the defendant had not questioned the court's jurisdiction but only that "each of the contested counts fail[ed] to state a claim upon which relief can be granted."). Again, in this case, the Remington Defendants' motion to dismiss does not challenge the sufficiency of Plaintiffs' allegations. The motion asserts that Plaintiffs can never plead facts that would deprive the Remington Defendants of PLCAA immunity in this case.

Plaintiffs cannot do so because the following immutable factual matters are evident from their pleadings: (1) Plaintiffs' damages resulted from a criminal misuse of the firearm; (2) the subject firearm was lawful for the Remington Defendants to manufacture, market and sell under all applicable federal and state laws; (3) the firearm was not defective; it functioned as it was designed to function; and (4) the Remington Defendants were the statutorily-defined "manufacturer" of the firearm, not its "seller," as those terms are defined in the PLCAA. There are no additional facts to plead that can turn the Remington Defendants' lawful manufacture of the subject firearm into an unlawful act, change the Remington Defendants into a "seller" of the firearm, or alter the fact that Plaintiffs' damages resulted from a criminal misuse of the firearm. The question raised by the Remington Defendants' motion to dismiss is not whether Plaintiffs have pleaded sufficient facts to avoid PLCAA immunity. The question is whether Plaintiffs have already pleaded facts that establish the Remington Defendants' immunity, thus establishing this Court's lack of subject matter jurisdiction.

A motion to dismiss is also the proper vehicle to address other jurisdictional infirmities in Plaintiffs' case, including whether they have standing to assert a CUTPA claim because they were not in commercial relationships with the Remington Defendants and whether immunity exists because CUTPA is not the type of statute Congress had in mind as a "statute applicable to the sale

or marketing" of firearms. Pleading additional facts cannot create commercial relationships or change the plain meaning of the PLCAA. Under these circumstances, a motion to dismiss is the proper procedural vehicle to address the Court's subject matter jurisdiction.

B. Defendants Have Not Waived their Right to File Requests to Revise and Motions to Strike.

Plaintiffs cite no authority supporting their argument that denial of a motion to dismiss on the basis that the subject matter of the motion was more properly presented as a motion to strike (or treating a motion to dismiss as a motion to strike) results in waiver of the right to file requests to revise and further motions to strike. Regardless, finding waiver under these circumstances would be unjust because another Connecticut Superior Court has expressly found that a defendant's assertion of PLCAA immunity "challenged subject matter jurisdiction." *See Gilland II*, 2011 Conn. Super. LEXIS 2309 at *16-19. Moreover, as discussed above, Connecticut courts have treated similar statutory immunities as jurisdictional.

As noted by the court in *Sabino v. Ruffolo*, 19 Conn. App. 402, 404-05, 562 A.2d 1134 (1989), although Practice Book § 113 (now § 10-6) requires pleadings to be filed in a specified order, the court can "otherwise order" that pleadings be filed in a different sequence. Practice Book § 10-7. The presence of this language giving the court discretion "demonstrates that no such automatic sanction [waiver] was intended with respect to the order of pleadings." *Id*. at 405. Moreover, Practice Book § 6 (now § 1-8) requires "liberal interpretation of the rules where 'strict adherence to them will work a surprise or injustice' because the very design of the rules is to 'facilitate business and advance justice.'" *Id*. at 404 (court exercised discretion to overlook simultaneous filing of motion to dismiss and motion to strike and considered motion to dismiss); *see also Comm'n on Human rights & Opportunities ex rel Cameron v. Hersh*, No. CVH7605, 2009 Conn. Super LEXIS 2336, *6-7 (Conn. Super. Ct. July 28. 2009) (court exercised discretion to

"eschew a rigorous application of the practice rules of denying subsequent motions to strike"). Under the circumstances, finding that the Remington Defendants have waived their right to file requests to revise and motions to strike would be patently unjust, particularly in light of the fact that they have filed a motion to dismiss that plainly questions the Court's subject matter jurisdiction.

Plaintiffs argue that should the Remington Defendants' motion to dismiss be denied, "defendants may not reap the benefits" by filing motions to strike. (Pls.' Obj. at 14.) But they stop short of explaining what benefits Defendants would "reap" or how Plaintiffs will be prejudiced by having to defend the sufficiency of their pleadings on motions to strike. If anything, it is Plaintiffs who seek to "reap" a benefit through their waiver argument by not having to address additional deficiencies of their case.[4]

[4] Plaintiffs did not file their complaint within CUTPA's three year statute of limitations and likely seek to avoid addressing this deficiency on an early motion. *See* General Statutes § 42-110g(f). The three-year limitation period applicable to CUTPA claims begins to run upon the occurrence of defendant's alleged violation, not its discovery. *Fichera v. Mine Hill Corp*., 207 Conn. 204, 213, 541 A. 2d (1988). Plaintiffs filed their original Complaint on December 13, 2014, more than three years after they allege that the Remington Defendants' manufactured and sold the firearm, *i.e.*, "sometime prior to March 2010." (FAC at ¶ 176.) In any event, Plaintiffs cannot avoid consideration of the CUTPA statute of limitations because it is jurisdictional and cannot be waived. *Ambroise v. Williams Raveis Real Estate*, 226 Conn. 757, 766-67, 628 A. 2d 1303 (1993) ("Where … a specific time limitation is contained within a statute that creates a right of action that did not exist at common law … the time limitation is a substantive and jurisdictional prerequisite, which may be raised at any time, even by the court *sua sponte*, and may not be waived."); *see also Blinkoff v. O & G Industries, Inc*., 113 Conn. App. 1, 8-9, 965 A. 2d 556 (2009) (CUTPA statute of limitations is jurisdictional); *Boston Property v. Merrill Lynch*, No. CV 116026660S, 2012 Conn. Super LEXIS 2578, *20-21 (Conn. Super. Ct. Oct. 16, 2012) (CUTPA statute of limitations addressed on motion to dismiss); *Dinan & Dinan, P.C. v. O'Rourke*, No. CV030405524, 2004 Conn. Super. LEXIS 2819, *3 (Conn. Super Ct. Sept. 24, 2004) (CUTPA statute of limitations addressed on motion to dismiss). Accordingly, Plaintiffs' CUTPA claim is subject to dismissal and can be properly dismissed by the Court *sua sponte* without consideration of any other jurisdictional basis for dismissal.

C. The Remington Defendants Were Not "Sellers" of the Firearm and Cannot Be Sued for Negligent Entrustment.

Congress plainly limited the availability of negligent entrustment actions to actions against those it defined as a "seller." 15 U.S.C. § 7903(5)(A)(ii) (A qualified civil liability action [for which immunity exists] "shall not include … an action brought against a *seller* for negligent entrustment or negligence per se.") (emphasis added). The omission of statutorily-defined "manufacturers" from the negligent entrustment exception was not a congressional oversight. Congress also omitted "manufacturers" from the definition of a "negligent entrustment" action:

> [T]he supplying of a qualified product by a *seller* for use by another person when the *seller* knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B) (emphasis added).

Legislative intent is reflected in the words used and the technical meaning given to those words by the legislature. Conn. Gen. Stat. § 1-1. The words and their meaning make it clear that the PLCAA permits a "negligent entrustment" action only against one who acted as a statutorily-defined "seller" of the firearm used by the criminal to cause injury. A "seller" is defined in the PLCAA, in pertinent part, as a "dealer," with reference to the definition of "dealer" found in United States Code "section 921(a)(11) of title 18." 15 U.S.C. § 7903(6)(B). Section 921(a)(11)(A) defines a "dealer," in pertinent part, as "any person engaged in the business of selling firearms at wholesale or retail." The phrase "engaged in the business" has its own technical meaning under Section 921. As applied to a "dealer" in firearms, a person is "engaged in the business" by:

> [D]evot[ing] time, attention, and labor to dealing in firearms as a regular course of trade or with the principal objective of livelihood and profit *through the repetitive purchase and resale of firearms*, but such term shall not include a person who makes occasional sales, exchanges, or purchases

> of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

18 U.S.C. § 921(a)(21)(C) (emphasis added). Thus, when the Remington Defendants sell a firearm they have manufactured to a downstream wholesale distributor or a retail dealer, they have not sold the firearm as a "dealer," as the term is defined in section 921(a)(11), and therefore have not sold the firearm as a "seller," as defined in the PLCAA. Only those who are "engaged in the business" of making "repetitive purchase[s]" of firearms manufactured by others for "resale" meet the definition of a "seller." Under the PLCAA, a "manufacturer" of a firearm cannot also be the firearm's "seller." The technical meanings given to these terms in the PLCAA make them mutually exclusive. *See Kraiza v. Planning & Zoning Commission of the Town*, 121 Conn. App. 478, 492-93, 997 A.2d 583 (2010) (when a term is defined in the statute, common and ordinary usage is not considered).[5]

Moreover, had Congress intended to make the "negligent entrustment" exception apply to both a "manufacturer" and a "seller," it could have done so, as it did in making other exceptions applicable to a "manufacturer or seller." *See, e.g.*, 15 U.S.C. § 7903(5)(A) ("The term 'qualified

[5] Those "engaged in the business" of manufacturing firearms must do so under a federally-issued manufacturer's license. A licensed manufacturer is able to sell the firearms it manufactures from its premises under its manufacturer license. *See* 27 CFR § 478.41 ("[I]t shall not be necessary for a licensed importer or a licensed manufacturer to also obtain a dealer's license in order to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured."). Plaintiffs' reliance on *Broughman v. Carver*, 624 F.3d 670, 677-78 (4th Cir. 2010), for the blanket proposition that a "manufacturer" and a "dealer" are not mutually exclusive is misplaced. *Broughman* merely stands for the proposition that one who has a dealer license but is also "engaged in the business" of manufacturing firearms must have a manufacturer's license in order to lawfully manufacture them. Plaintiffs' reliance on the definition of "dealer" under National Firearm Act ("NFA") is also misplaced. Merely because Congress chose to distinguish between a "dealer" and "manufacturer" differently in the NFA than it did in the PLCAA, does not, as Plaintiffs contend, turn a "manufacturer" of a firearm into its "seller" for purposes of assessing PLCAA immunity. *See* 26 U.S.C. § 5845(k) (under the NFA, "[t]he term 'dealer' means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans."). Regardless, the NFA and PLCAA definitions of a "dealer" are harmonious. They both define "dealer" to exclude manufacturers.

civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a *manufacturer or seller* ….''); 15 U.S.C. § 7903(5)(A)(iii) ("an action in which a *manufacturer or seller* of a qualified product knowingly violated … a statute applicable to the sale or marketing of the product….''); 15 U.S.C. § 7903(5)(A)(iii)(I) ("any case in which the *manufacturer or seller* knowingly made any false entry….''); 15 U.S.C. § 7903(5)(A)(iii)(II) ("any case in which the *manufacturer or seller* aided, abetted or conspired with another person….'') (emphasis added throughout). Under Plaintiffs' interpretation, Congress need only have used the term "seller" in these other provisions to achieve the purpose of protecting both manufacturers and sellers from liability. But that is not what Congress did. The "negligent entrustment" exception stands apart because it is only intended to apply to the technically-defined "seller" of the criminally-misused firearm.

Plaintiffs' attempt to confuse the technical meaning given to "seller" and create ambiguity should be rejected. But assuming that the definition of a "seller" in the PLCAA was somehow found to be ambiguous, legislative history resolves any ambiguity because it plainly supports the interpretation that the "negligent entrustment" exception was not intended to reach manufacturers:

> One exception, for example, would purport to permit certain actions for "negligent entrustment". The bill goes on, however, to define "negligent entrustment" extremely narrowly. The exception applies only to sellers, for example, and would not apply to distributors or manufacturers no matter how egregious their conduct. Even as to sellers, the exception would apply only where the particular person to whom a seller supplies a firearm is one whom the sellers knows or ought to know will use it to cause harm.

151 Cong. Rec. S9071 (Sen. Feinstein) (reading from a letter signed by 50 law school professors).

> Nothing in this bill is intended to allow "leap frogging" over the gun dealer to the manufacturer. The negligent entrustment exception provision applies specifically to the situation where a dealer knows or reasonably should know that a dangerous person is purchasing a firearm with the intent to commit, and does commit a crime with the firearm. When a manufacturer has done nothing but sell a legal, non-defective product according to the

> law, the negligent entrustment provision would not allow bypass of the gun dealer to get to the deeper pockets of the manufacturer.

151 Cong. Rec. S9374 (Sen. Craig); *see State v. Panek*, 2014 Conn. Super LEXIS 922, *14 (Conn. Super. Ct. Apr. 21, 2014) (despite finding plain and unambiguous meaning, the court examined legislative history and found it "fully consistent with the court's conclusion"). There is nothing in the text of the PLCAA, its legislative history or related statutory provisions that supports Plaintiffs' construction of the term firearm "seller" under the PLCAA.[6]

D. Plaintiffs Do Not Have Standing to Maintain a CUTPA Claim.

Plaintiffs' argument that any person who has an "ascertainable loss" has standing to maintain a CUTPA action has been rejected by Connecticut courts. "It strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of trade or commerce." *Jackson v. R.G. Whipple, Inc*., 225 Conn. 705, 724, 627 A.2d 374 (1993); *Ganim v. Smith & Wesson Corp*., 258 Conn. 313, 373, 780 A.2d 98 (2001) ("If the only standing requirement under CUTPA were that, as a result of the defendant's prohibited conduct, the plaintiff suffered an ascertainable loss of money or property … then any plaintiff who could, in a 'but for' cause sense, trace his or her loss to the defendant's wrongful conduct, would have standing to assert a CUTPA claim against the defendant,

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[6] Even assuming, *arguendo*, that the Remington Defendants were considered "seller[s]" of the firearm under the PLCAA, their alleged actions with respect to the subject firearm do not meet the PLCAA definition of "negligent entrustment." 15 U.S.C. § 7903(5)(B). The Remington Defendants sold the lawfully-manufactured firearm to Camfour, a federally-licensed wholesale distributor of firearms. Camfour's alleged actions with respect to the firearm – merely selling it to a federally-licensed retail dealer – cannot constitute a "use" of the firearm "involving an unreasonable risk of physical injury to the person or others." *Id*. Because all firearms are capable of being misused, every firearm manufacturer and wholesale distributor would be exposed to the burdens of litigation in the event that the misuse causes a risk of harm, under such an expansive interpretation. *Id*. PLCAA immunity was created, in part, to protect firearm industry members against this very kind of claim. The Remington Defendants adopt the arguments made by Camfour regarding the meaning of "use" in the PLCAA's definition of "negligent entrustment." 15 U.S.C. § 7903(5)(B).

irrespective of how remote or derivative that loss was. That would render CUTPA subject to yielding bizarre results.").

The categories of persons held to have standing to bring a CUTPA claim are consumers, competitors and other business persons. *See Fink v. Golenbock*, 238 Conn. 183, 215, 680 A.2d 1243 (1996). "[CUTPA] was designed to protect two classes or deal with two sets of problems. First, there is the protection of consumers from unfair or deceptive acts or practices. Then there is a concern with ensuring fair competition and in order to accomplish that end, competitors and other business people can bring a CUTPA action." *Cayer v. Pereira*, No. CV 1350109575S, 2014 Conn. Super. LEXIS 823, *8-9 (Conn. Super. Ct. Apr. 10, 2014); *see also Partch v. Wilton Meadows Health Care Ctr. Corp*., No. CV 126029435S, 2013 Conn. Super. LEXIS 3001, *31 (Conn. Super. Ct. Dec. 31, 2013) ("Thus, today, the Supreme Court interprets the 'trade' or 'commerce' language of §§ 42-110b and 42-110a(4) to merely require some sort of business or commercial relationship with the defendant.").

Plaintiffs acknowledge that the case law supports the Remington Defendants' position that they lack standing to maintain their CUTPA claim. (Pls.' Obj. at 43 ("[W]e acknowledge that these cases and others cited support defendants' construction of CUTPA…").) Plaintiffs suggest nevertheless that the Connecticut Supreme Court's decision in *Ganim* is an "indication" that they should be permitted to pursue their claim. (Pls.' Obj. at 42.) But *Ganim* is hardly a signal that the supreme court will expand the reach of CUTPA beyond commercial relationships. The court in *Ganim* simply did not reach the question.

In *Ganim*, the court affirmed dismissal of the many claims brought by the City of Bridgeport, including a CUTPA claim, against firearm industry members alleging that their business activities caused the City to incur additional expenses for certain services and lose tax

revenue. The court affirmed dismissal of the case on the basis that the City's alleged damages were too remote from the defendants' alleged conduct. 258 Conn. at 365. Thus, the court found it "unnecessary to consider whether CUTPA standing is confined to consumers, competitors and those in some business or commercial relationship with the defendants." *Id*. at 372.[7]

Notably, the superior court in *Ganim* dismissed the CUTPA claim on the basis that the act "recognizes three categories of plaintiffs: consumers; competitors; and other business persons affected by unfair or deceptive acts." *Ganim v. Smith & Wesson Corp*., No. CV 990153198S, 1999 Conn. Super LEXIS 3330, *32-33 (Conn. Super. Ct. Dec. 10, 1999). It joined the substantial number of Connecticut Superior Courts that have recognized that CUTPA's purpose is to protect consumers and ensure fair competition in the marketplace, and have held that standing under CUTPA is limited to persons with relationships to the defendant in the commercial marketplace.

Connecticut Superior Courts are divided on whether personal injury damages are available under CUTPA. *Compare Rodriguez v. Westland Properties, Inc*., No. CV2077228, 2004 Conn. Super. LEXIS, *7 (Conn. Super. Ct. Mar. 17, 2004) (personal injury damages not within the scope of injuries that CUTPA was intended to address); *Mola v. Home Depot USA*, No. CV980167635S, 2001 Conn. Super. LEXIS 3082, *2 (Conn. Super. Ct. Oct. 29, 2001) (some personal injury claims are within the ambit of CUTPA). There is also a lack of consensus on whether wrongful death

[7] In reaching its conclusion, the court in *Ganim* observed that damages sustained by those directly injured by the misuse of firearms "exist[] at a level less removed" from the defendants' conduct. 258 Conn. at 359. The court's observation, however, cannot fairly be read as a signal that victims of firearms violence would have standing under CUTPA without first establishing that they were consumers of the defendant's product or in a commercial relationships with the defendant. Moreover, even if the requisite commercial relationship were established, the exclusivity provision in the Connecticut Product Liability Act ("CPLA") would bar recovery under CUTPA. Conn. Gen. Stat. § 52-572m (CPLA is the exclusive remedy for "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product" regardless of whether they sound in strict-liability, negligence or other theories of recovery). Plaintiffs' allegations regarding the suitability of the subject firearm's design features for civilian use and the manner in which the firearm was marketed are allegations falling within the CPLA.

damages are available under CUTPA. *Compare Rivera v. Simonetti*, No. CV044000920, 2005 Conn. Super LEXIS 1999, *13 ("[T]he wrongful death statute provides the exclusive remedy for recompense for injury resulting in death."); *Abbhi v. AMI*, No. CV960382195S, 1997 Conn. Super. LEXIS 1523, *11-12 (Conn. Super. Ct. June 3, 1997) (CUTPA actions held not to abate at the time of death). However, courts that have permitted CUTPA claims for personal injury or wrongful damages, have done so only in the context of a commercial relationship between the plaintiff and defendant, including landlord/tenant, patient/physician and consumer/supplier relationships. Again, the Plaintiffs in this case do not—and cannot—allege that they have a commercial relationship of any kind with the any of the Defendants. As a result, they do not have standing to maintain a CUTPA claim.

E. CUTPA Does Not Qualify as a Predicate Statute under the Plain Meaning of the PLCAA Text and Guiding Precedent.

The plain meaning rule requires that legislative intent first "be ascertained from the text of the statute." Conn. Gen. Stat. § 1-2z; *accord United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003) ("Statutory analysis begins with the plain meaning of the statute."). Application of the plain meaning rule to the PLCAA requires a finding that the type of statutes Congress had in mind as predicate statutes under section 7903(5)(A)(iii) are those that Congress specifically enumerated as examples in the text of the predicate exception itself, and other similar statutes that also "actually regulate the firearms industry." *City of New York v. Beretta*, 524 F.3d 384, 402-03 (2d Cir. 2008). This interpretation does not "yield absurd or unworkable results" but is entirely consistent with the overall purpose of the PLCAA: to provide immunity to firearm manufacturers who conduct their manufacturing activities in accordance with the myriad federal, state and local laws applicable to their highly-regulated businesses. *See* Conn. Gen. Stat. § 1-2z; *see Heim v. Zoning Board of Appeals*, 288 Conn. 628, 637, 953 A.2d 877 (2008) ("We must always construe a regulation in

light of its purpose.") (citing *West Hartford Interfaith Coalition v. Town Council*, 228 Conn. 498, 508 (1994) ("[a] statute should not be construed to thwart its purpose.")).[8]

Plaintiffs argue that application of the plain meaning rule compels a different conclusion: that CUTPA's broad, remedial liability scheme falls within the category of statutes Congress intended to serve as predicate statutes under section 7903(5)(A)(iii) because CUTPA "clearly implicates and is applicable to the sale and marketing of firearms. " (Pls.' Obj. at 37.) Plaintiffs' argument should be rejected for multiple reasons. First, Plaintiffs' interpretation of "applicable" as used in section 7903(5)(A)(iii) has been expressly rejected by the two federal appellate courts to have considered its plain textual meaning. *See City of New York*, 524 F.3d at 402; *Ileto v. Glock*, 565 F.3d 1126, 1134 (9th Cir. 2009). Second, Plaintiffs' interpretation would yield an absurd result by creating an expansive exception to PLCAA immunity that would essentially nullify the PLCAA's purpose to provide immunity to firearm manufacturers that conduct their businesses lawfully. *City of New York*, 524 F.3d at 401-02. There can be no credible dispute that permitting an alleged violation of CUTPA to serve as an exception to firearm manufacturer immunity would have such an effect. *See Sportsmen's Boating Corp. v. Hensley*, 192 Conn. 148, 156, 645 A.2d 505 (1984) (CUTPA embraces a much broader range of business conduct than common law tort actions). A mere allegation of an "unfair" practice under CUTPA's broad, remedial scheme would

[8] Plaintiffs undermine their credibility by describing the Remington Defendants' plain meaning interpretation of the PLCAA as "tortured." (Pls.' Obj. at 7.) They further undermine their credibility by representing (through misuse of quotation marks) that the United States District Court declined to adopt the Remington Defendants' interpretation and remanded this case on the ground that "CUTPA does fit within the scope of the predicate exception even though it does not expressly refer to firearms." *Id.* The court did not reach that conclusion and, in fact, refused to "interpret and apply the PLCAA" because it did "not have jurisdiction to delve into the merits of the dispute." *Soto v. Bushmaster Firearms*, No. 3:15CV68 (RNC), 2015 U.S. Dist. LEXIS 138046, *12-14 (D. Conn. Oct. 9, 2015). Rather, the district court, borrowing from Fed. R. Civ. P. 11, reasoned that remand and "fraudulent joinder … turns not on how likely a claim is to succeed, but rather on whether the claim is objectively frivolous." *Id.* at *8. After describing Plaintiffs' argument that CUTPA "fit[s] within the scope of the predicate exception" as "reasoned" rather than objectively frivolous, the court observed that "the immunity provided by the PLCAA" could nevertheless

expose a law-abiding manufacturer of lawful firearms to the burdens of litigation and potential liability for harm caused by a remote third party's criminal acts – simply because it manufactured and marketed its lawful products. A statutory exception is not to be construed so broadly that it defeats the primary purpose of the statute. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *Hartford v. Freedom of Information Commission*, 210 Conn. 421, 431, 518 A.2d 49 (1986) (exceptions to FOIA disclosure must be narrowly construed to preserve policy favoring public disclosure).

Because Plaintiffs' application of the plain meaning rule yields an absurd or unworkable result, the Court can consider "extratextual evidence," such as legislative history to ascertain meaning. Conn. Gen. Stat. § 1-2z. When legislative history is consulted, Plaintiffs' interpretation of section 7903(5)(A)(iii) collapses. It was "the unanimously expressed understanding" of legislators that predicate statutes were to be only those "concerning firearm regulations or sales and marketing regulations." *Ileto*, 565 F.3d at 1137; *City of New York*, 524 F.3d at 402-03 ("[T]he predicate exception was meant to apply only to statutes that actually regulate the firearms industry" in light of the consistent statements made by legislators). Elsewhere in the PLCAA, Congress made a finding that the firearms industry is "heavily regulated by Federal, State and local laws" and that "[s]uch Federal Laws include the Gun Control Act of 1968, the National Firearms Act (26 U.S.C. §§ 5801 *et seq*.), and the Arms Export Control Act (22 U.S.C. §§ 2751 *et seq*.). 15 U.S.C. § 7901(a)(4). Neither the PLCAA text nor its legislative history reveals congressional intent that statutes such as CUTPA were to serve as predicate statutes under the predicate exception.[9]

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still "result in dismissal." *Id*. at *12-13.

[9] Plaintiffs appear to endorse use of the *ejusdem generis* rule to interpret the predicate exception, but reject the conclusion reached by the court in *City of New York* based on the rule. (Pls.' Obj. at 38-39.) In

Plaintiffs pronounce that *City of New York* supports their position (Pls.' Obj. at 34), but then distance themselves from the decision by pointing out that "it is not binding" (*id*. at 38), and that this Court "need not make the same interpretative choices" that were made by the Second Circuit (*id*. at 36, n. 19). *But see Webster Bank v. Oakley*, 265 Conn. 539, 555 n.16, 830 A.2d 139 (2003) ("[T]he decisions of the Second Circuit Court of Appeals carry particular persuasive weight in the interpretation of federal statutes in Connecticut state courts … [and] that court's decisions may be more helpful to us if we follow the same analytical approach to federal statutory interpretation that it does."). Plaintiffs further muddle their reliance on *City of New York* by asking the Court to adopt as "persuasive" the interpretation given to "applicable" by the *dissenting* judge in the case and the district court judge who was reversed. (Pls.' Obj. at 38.) Exactly where Plaintiffs stand with respect to *City of New York* is not clear, but what is clear is that the court followed the same interpretative rules as Connecticut courts follow. *See Ripa*, 323 F.3d at 81 ("Statutory analysis begins with the plain meaning of the statute.").

The court in *City of New York* found the New York nuisance statute to be not "applicable to the sale or marketing" of firearms under the rules of statutory interpretation—not because, as Plaintiffs suggest, "New York's high courts had already indicated disapproval of such a claim." (Pls.' Obj. at 36, n. 20.) In *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001), the court rejected imposition of a common law duty on the part of firearm manufacturers and distributors to exercise ordinary care in marketing and distributing handguns. Plaintiffs did not plead a statutory

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any event, the court's application of *ejusdem generis* was within the parameters of the plain meaning rule because it did not require leaving the text of the statute itself to determine meaning. And resort to the rule is not dependent on an initial finding of ambiguity. *See Town of Stratford v. Jacobelli*, 317 Conn. 863, 873-75, 120 A.3d 500 (2015) (using *ejusdem generis* rule to find clear and unambiguous meaning). Under the rule, the specific examples of statutes "applicable to the sale or marketing" of firearms included in the predicate exception help shape the more general description of predicate statutes. *See id*. at 872 ("[W]here a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to…things of the same general kind or character as those specified in the particular enumeration.").

nuisance action and the court did not address the state nuisance statute. Similarly, in *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (N.Y. App. 2003), the plaintiffs did not plead a statutory nuisance claim, and the court did not consider application of the state nuisance statute to the defendants' alleged business activities. Rather, the court affirmed dismissal of a common law public nuisance action. There was no "context of prior decisions" by New York state courts addressing the viability of a cause of action against firearm manufacturers and sellers under the state nuisance statute, as Plaintiffs claim. (Pls.' Obj. at 36, n. 20.)

Plaintiffs argue that "CUTPA clearly implicates and is applicable to the sale and marketing of firearms," but provide no support for that conclusion in the plain language of the statute, rules of statutory interpretation or legislative history. (Pls.' Obj. at 37.) Plaintiffs cite only *Salomonson v. Billistics, Inc*., No. CV-88-508292, 1991 Conn. Super. LEXIS 2231 (Conn. Super. Sept. 27, 1991), as support. (Pls.' Obj. at 37.) *Salomonson*, however, was a case involving disappointed commercial expectations of the plaintiff, a firearms collector, who entered into a contract with the defendant to have certain remanufacturing work performed on his firearms. 1991 Conn. Super. LEXIS 2231, at *25. The defendant was also to prepare and submit applications to the federal government for approval to do the work and transfer the firearms back to the plaintiff when the work was completed. *Id*. The defendant failed to timely deliver the completed firearms to the plaintiff and made allegedly deceptive statements regarding the status of government approval. *Id*. The court found that the defendant's failure to deal in good faith with the plaintiff was oppressive and violated CUTPA. *Id*. at *37.

Salomonson merely stands for the proposition that CUTPA applies to commercial transactions involving goods in which a consumer suffers an ascertainable loss of money or property. That firearms were the goods at issue was irrelevant to the court's decision. *Salomonson*

does not stand for the broader proposition that CUTPA, in and of itself, "clearly can be said to implicate" the "sale or marketing" of firearms in the context of the PLCAA. *See City of New York,* 524 F.3d at 403. If anything, *Salomonson* underscores the necessity of a commercial relationship between the parties as a prerequisite to CUTPA standing.

CONCLUSION

Plaintiffs' incorrect interpretation of the PLCAA would expose the Remington Defendants to the burdens of litigation and potential liability simply because they lawfully manufactured and marketed a class of firearms commonly owned by law-abiding persons for lawful purposes. Although Plaintiffs plainly disagree with federal and state legislative determinations that it was appropriate for law-abiding persons, like Nancy Lanza, to own the firearms, this is not the forum in which their disagreement should be resolved. While the PLCAA does not provide firearm manufacturers blanket immunity in all cases, it provides complete immunity to the Remington Defendants here. Plaintiffs' case against them should be dismissed based on the immunity provided by the PLCAA.

Dated: February 16, 2016.

THE DEFENDANTS,

REMINGTON ARMS CO., LLC and
REMINGTON OUTDOOR COMPANY, INC.

BY:/s/ Scott M. Harrington/#307196

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CERTIFICATE OF SERVICE

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